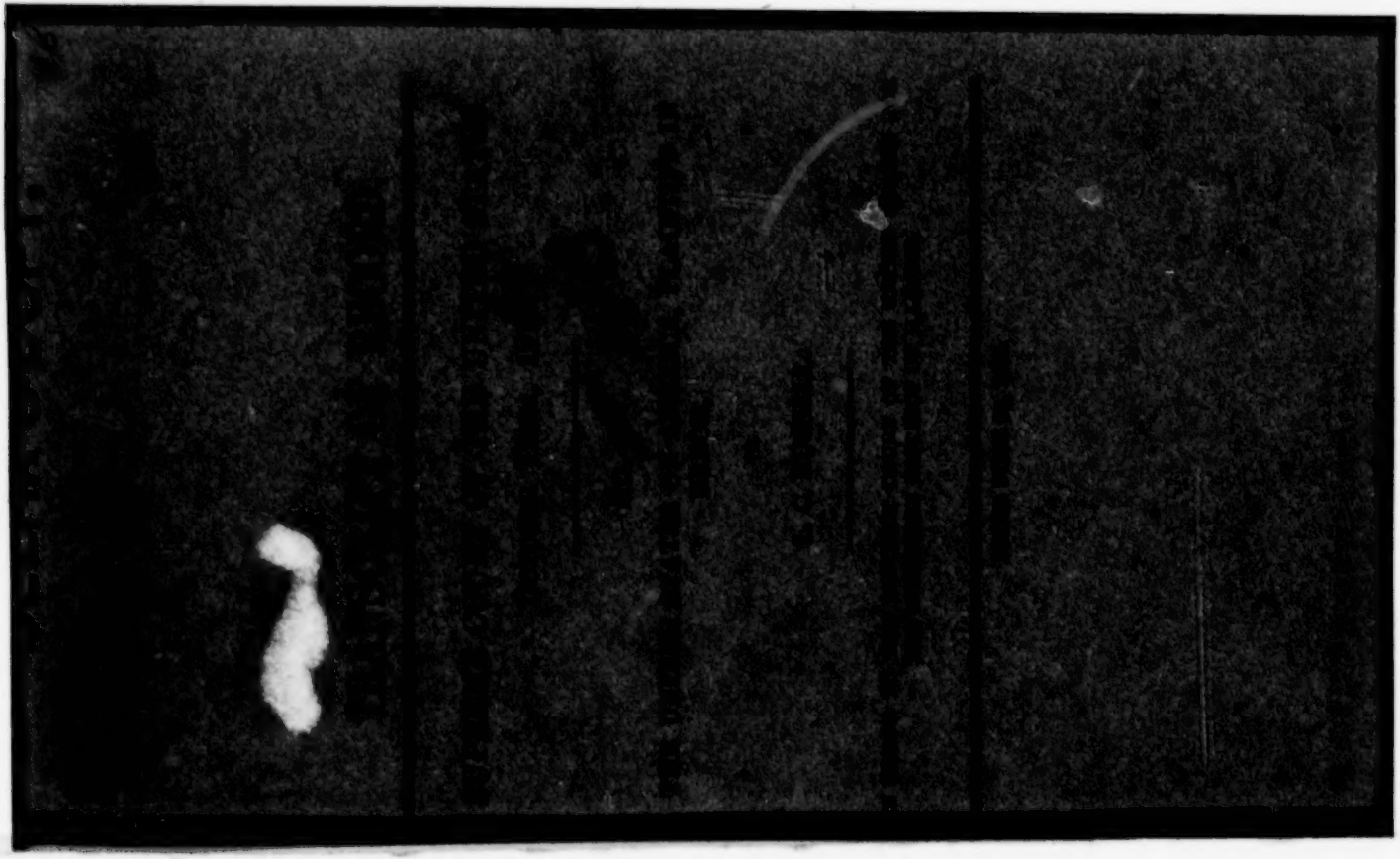


SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 457.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

L. C. RUSSELL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois, begun and held at the United States courtrooms, in the city of Chicago, in said division and district, on the first Monday of May (it being the 5th day thereof), in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States of America the 143rd year.

Present the Honorable Kenesaw M. Landis, judge of said court, presiding; John J. Bradley, United States marshal for said district; and T. C. MacMillan, clerk of said court.

2 Be it remembered that heretofore, to wit, on the 1st day of May, A. D. 1918, the following order was had and entered of record in Case Number 6311, wherein The United States of America is plaintiff and L. C. Russell is defendant, in the District Court of the United States for the Eastern Division of the Northern District of Illinois, before the Honorable Kenesaw M. Landis, judge, to wit:

THE UNITED STATES *vs.* L. C. RUSSELL.	6311.

Comes the grand jury this day and returns in open court an indictment against L. C. Russell, the defendant herein, whereupon on motion of the United States attorney it is ordered by the court that said indictment be filed and the cause placed upon the dockets of this court, and the amount of the bail bond be fixed at the sum of twenty thousand dollars, and that a bench warrant be awarded for the defendant.

3 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

Of the April term, in the year 1918.

First count.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the April term thereof, in the year nineteen hundred and eighteen, and inquiring for said division and district, upon their oath present, that L. C. Russell, whose Christian name is to said grand jurors unknown, late of the city of Chicago, in said division and district, on April 1, 1918, at Chicago aforesaid, in said division and district, unlawfully did corruptly endeavor to influence one William D. Russell, who, as said L. C. Russell then and there well knew, was then a

petit juror in said court, in the discharge of his duty as such petit juror, and this in the manner and by the means following, that is to say:

Said William D. Russell, as said L. C. Russell then well knew, had been summoned to attend as a petit juror of said court on April 3, 1918, at which time the trial of William D. Haywood and others, upon indictment No. 6125, was to begin in said court. Endeavoring to ascertain in advance of the examination of said William D. Russell in said court as to his qualifications to sit as a petit juror at said trial whether said William D. Russell was favorably inclined towards said William D. Haywood and his codefendants, and corruptly to induce said William D. Russell to favor the acquittal
4 of said William D. Haywood and his codefendants in case he should be selected as a petit juror at said trial, said L. C. Russell, on said April 1, 1918, called at the home of said William D. Russell at No. 604 West Thirty-first Street, in said city of Chicago, and engaged Lucy Russell, wife of said William D. Russell, in a conversation, in the course of which said L. C. Russell told said Lucy Russell that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; by means of which request and statement said L. C. Russell conveyed to Lucy Russell, and endeavored to convey to said William D. Russell, an offer to pay money to said William D. Russell in return for his favoring such acquittal; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

Second count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said L. C. Russell, on said April 1, 1918, at Chicago aforesaid, in said Eastern Division of said Northern District of Illinois, in and by the doing of the things charged against him in the first count of this indictment under the circumstances and in manner and form as set forth in said first count, the allegations of which said first count in that behalf are incorporated
5 in this count as fully as if they were here repeated, unlawfully did corruptly influence, obstruct and impede the due administration of justice in said District Court of the United States for said division and district in the matter of the trial of said William D. Haywood and his said codefendants, he the said L. C.

Russell, then and there well knowing that said William D. Russell had been summoned to attend such court as a petit juror, that said trial was about to begin, and that thereby justice was being and was to be administered in said court; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

CHARLES F. CLYNE,
United States Attorney.

(Endorsed:) No. 6311. United States District Court, Northern District of Illinois, Eastern Division. The United States of America vs. L. C. Russell. Indictment Vio. Sec. 135 C. C. Influencing petit juror and obstructing justice. A true bill. Leonard A. Smith, foreman. Filed in open court this 1st day of May, A. D. 1918. T. C. MacMillan, clerk. Bail $.....

6 And afterwards, to wit, on the 1st day of May, A. D. 1918, there was issued out of and under the seal of said court, in the above-entitled cause, a bench warrant, same being in the words and figures following, to wit:

The President of the United States of America, to the marshal of the Northern District of Illinois, greeting:

You are hereby commanded that you take L. C. Russell if he shall be found in your district, and him safely keep, so that you have his body forthwith before the judge of the District Court of the said United States for the Northern District of Illinois, at Chicago, in the Eastern Division of the said district, to answer unto the said United States in an indictment pending in the said court against him for violation of section 135 of the Criminal Code of the United States at Chicago on April 1, 1918, by unlawfully and corruptly endeavoring to influence William D. Russell, who was then and there a juror in the District Court of the United States for the Northern District of Ilinois engaged in the trial of the cause numbered 6125, entitled The United States vs. William D. Maywood, et al. to favor the acquittal of the defendants in said cause, and have you then and there this writ, with your return hereon.

Witness, the Hon. Kenesaw M. Landis, judge of the District Court of the United States of America for the Northern District of Illinois, at Chicago, aforesaid, this 1st day of May, in the year of our Lord, nineteen hundred and eighteen, and in the 142nd year of the Independence of the said United States.

[Seal of the Court.]

T. C. MACMILLAN,
Clerk.

7

8 (Endorsed:) No. 6311. District Court of the United States, Northern District of Illinois. United States of America vs. L. C. Russell. Bench warrant. Returnable forthwith. T. C. MacMillan, clerk.

I return this writ unexecuted, being unable to find L. C. Russell within my district this 8 day of July, A. D. 1918.

JOHN J. BRADLEY,
U. S. Marshal.
By HENRY L. DEIKE,
Deputy.

Filed Jul. 8, 1918, at — o'clock — m. T. C. MacMillan, clerk (B).

9 And afterwards, to wit, on the 12th day of July, A. D. 1918, there was filed in the clerk's office of said court, in the above entitled cause, a præcipe of U. S. attorney for certified copy of indictment and bench warrant; same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Præcipe.

To Hon. T. C. MACMILLAN,
Clerk of said court:

Please prepare for me a certified copy of the indictment and bench warrant in the above-entitled case for the apprehension of the above-named defendant.

CHARLES F. CLYNE,
U. S. Attorney.

(Endorsed:) No. 6311. U. S. *vs.* L. C. Russell. Præcipe of U. S. Atty. for certified copy of indt. and bench warrant. Filed July 12, 1918. T. C. MacMillan, clerk.

10 And afterwards, to wit, on the 12th day of September, A. D. 1918, following order was had and entered of record in said cause, before the Honorable Kenesaw M. Landis, judge, to wit:

THE UNITED STATES
vs.
L. C. RUSSELL. } 6311.

Comes the United States by United States attorney; comes also the defendant L. C. Russell, in his own proper person and the defendant being arraigned upon the indictment filed herein against him pleads not guilty thereto, whereupon it is ordered by the court that this cause be continued.

11 And afterwards, to wit, on the 19th day of November, A. D. 1918, the following order was had and entered of record in said cause before the Honorable Kenesaw M. Landis, judge, to wit:

THE UNITED STATES
vs.
L. C. RUSSELL. } No. 6311.

Comes the United States by United States attorney; comes also the defendant in his own proper person and by leave of court first had and obtained withdraws his plea of not guilty heretofore entered herein with leave to file a demurrer to said indictment.

12 And afterwards, to wit, on the 19th day of November, A. D. 1918, there was filed in the clerk's office of said court in the above-entitled cause a demurrer to indictment, same being in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, Eastern Division, ss:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
L. C. RUSSELL, DEFENDANT. } No. 6311. Criminal.

Demurrer to indictment.

And the said defendant, L. C. Russell, by Otto Christensen, his attorney, comes now and says that the said indictment, and each and every count thereof, and the matters and things therein contained, are, as therein and thereby set forth and alleged, not sufficient in law to compel him, the said defendant, to answer thereunto, for that—

1. That said indictment does not, nor does either count thereof, state facts sufficient to constitute a public offense against the United States under the laws thereof.

2. That said indictment, and each and every count thereof, is and are uncertain, indefinite, and insufficient, in that it does not appear in or by said indictment, nor any count, paragraph, sentence, or line thereof, by any sufficient averment or recital, by jurisdictional facts, that any cause involving any issue of fact triable by a jury, was at the time in said indictment mentioned, pending in the district court of the United States, or any other court, whereby the above-named United States District Court does or could acquire jurisdiction in the premises.

3. That said first count of said indictment does not, nor does
13 any paragraph, sentence, or line thereof, state facts sufficient to constitute an offense under the laws of the United States.

4. That said first count of said indictment is indefinite, uncertain and ambiguous in this:

(a) That it can not be ascertained from said first count, nor from any paragraph, sentence or line thereof, whether or not the alleged juror, William D. Russell, did as a matter of truth and of fact, at the time and place alleged in said indictment, possess the necessary statutory qualifications to act as juror in said or any court.

(b) That it can not be ascertained from said first count, nor from any paragraph, sentence or line thereof, whether or not the alleged juror, William D. Russell, had, as a matter of truth and of fact, at the time and place alleged in said indictment, been duly and regularly drawn and summoned to act as a juror.

(c) That it can not be ascertained from said first count, nor from any paragraph, sentence or line thereof, whether or not, at the time of the alleged conversation attempted to be set forth in said indictment herein, the alleged juror, William D. Russell, had been examined and accepted as a juror at the array.

(d) That it can not be ascertained from said first count, nor from any paragraph, sentence or line thereof, at what time and at what place the alleged conversation attempted to be set up in said indictment was had.

(e) That it can not be ascertained from said first count as a whole, nor from any line, sentence or paragraph thereof, at what time and at what place, the said Lucy Russell received the impression as to the meaning and support of the alleged conversation attempted to be set up in said indictment.

(f) That it can not be ascertained from said count as a whole nor from any sentence or line thereof, whether or not, as a matter of fact, the said Lucy Russell, at the time of the alleged conversation attempted to be set up in said indictment, did have access to her husband, the alleged juror, William D. Russell, and whether or not, as a matter of truth and of fact, she did have an opportunity or could in any wise whatsover, have communicated the sub-
14 ject matter of the alleged conversation attempted to be set up in said indictment, to the alleged juror, William D. Russell.

(g) That it can not be ascertained from said first count as a whole, nor from any paragraph, sentence or line thereof, whether or not the defendant, L. C. Russell, did know that the said Lucy Russell did have an opportunity to communicate the subject matter of said alleged conversation to the alleged juror, William D. Russell.

(h) That it can not be ascertained from said first count as a whole, nor from any paragraph, sentence or line thereof, whether or not said alleged juror, William D. Russell, was at the time in said indictment mentioned, a juror in any particular case in said or any court.

5. That the second count of said indictment does not, nor does any paragraph, sentence or line thereof, state facts sufficient to constitute an offense under the laws of the United States.

6. That said second count of said indictment is indefinite and uncertain and ambiguous for each and all of the reasons set forth in paragraph four (4) hereof, each and all of said reasons being here referred to and made a part hereof as if herein repeated at length.

7. That the alleged offense attempted to be set up in the second count of said indictment, is repugnant to the alleged offense attempted to be set up in the first count thereof, in that the alleged offense attempted to be set up in said first count shows at most but an arbortive attempt to commit the alleged offense set up in said first count, while said second count attempts to set up a completed offense, predicating, however, the said alleged completed offense upon the facts, matters and things in said first count contained, which are manifestly contradictory to an allegation of a completed offense.

8. For that said second count of said indictment is double and multifarious in that it attempts to set forth two distinct and several offenses, in this, that it is there charged that said defendant did corruptly influence the due administration of justice, and in one and the same count charged that said defendant did obstruct and impede the due administration of justice, the same being wholly separate and distinct alleged offenses, and require wholly distinct kinds and classes of evidence to establish or combat the allegations thereof.

9. That said second count of said indictment is further vague, uncertain, indefinite and insufficient, in that the same is predicated upon a charge, to wit: That said defendant did obstruct and impede the due administration of justice in said District Court of the United States for said division and district, said charge being wholly based upon the recital of the supposed facts, matters and things in said first count mentioned, wherein said charge of said second count is repugnant, as said supposed facts, matters and things in said first count mentioned set forth no matter or manner of force or violence or menace thereof, whereas said charge of obstructing and impeding necessarily imply the use or menace of force and violence.

And this the said defendant is ready to verify, wherefore he prays judgment, and that he be dismissed and discharged of the said indictment.

OTTO CHRISTENSEN,
Attorney for said defendant.

(Endorsed:) Gen'l No. 6311. District Court of the United States, Northern District of Illinois, Eastern Division. The United States of America, plaintiff, vs. L. C. Russell, defendant. Demurrer to indictment. Filed Nov. 19, 1918, at — o'clock — M. T. C. MacMillan, clerk.

16 And afterwards, to wit, on the 6th day of May, A. D. 1919, the following order was had and entered of record in said cause, before the Honorable George A. Carpenter, judge, to wit:

THE UNITED STATES
vs.
L. C. RUSSELL. } 6311.

This cause coming on to be heard upon the demurrer of the defendant to the indictment filed herein against him come the parties by their attorney and after hearing arguments of counsel to conclusion the court being not sufficiently advised in the premises, takes time to consider.

17 And afterwards, to wit, on the 27th day of May, A. D. 1919, the following order was had and entered of record in said cause, before the Honorable George A. Carpenter, judge, to wit:

UNITED STATES
vs.
L. C. RUSSELL. } 6311.

This cause coming on again to be heard upon the demurrer of the defendant to the indictment filed herein against him, come the parties by their attorneys and the court having taken time to consider and being now fully advised in the premises, it is ordered by the court that said demurrer be and the same hereby is sustained and that the indictment herein be and the same hereby is dismissed, to which order of the court the plaintiff, by its attorney, duly excepts and files herein its assignments of errors and petition for a writ of error and thereupon it is further ordered by the court that a writ of error to the Supreme Court of the United States be, and the same hereby is, allowed.

18 And afterwards, to wit, on the 27th day of May, A. D. 1919, there was filed in the clerk's office of said court, in the above entitled cause, a certificate of district judge; same being in the words and figures following, to wit:

In the United States District Court, Northern District of Illinois.

UNITED STATES OF AMERICA
vs.
L. C. RUSSELL. } No. 6311.

This is to certify that in entering an order on the twenty-seventh day of May, 1919, in the above entitled cause, sustaining the demurrer and dismissing the proceedings, I was of the opinion that there was no statute of the United States making the matters charged in the

indictment a crime. No question of an interpretation of the indictment was involved in my decision.

CARPENTER,
Judge of the United States District Court
for the Northern District of Illinois.

(Endorsed:) No. 6311. U. S. District Court, Northern District of Illinois. United States v. L. C. Russell. Certificate of district judge. Filed May 27, 1919, at — o'clock — M. T. C. MacMillan, clerk.

19 And afterwards, to wit, on the 27th day of May, A. D. 1919, there was filed in the clerk's office of said court, in the above entitled cause, a petition; same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

In the District Court thereof, May term, A. D. 1919, *ss:*

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Petition.

To the Honorable GEORGE A. CARPENTER,
Judge of the District Court of the United States
for the Northern District of Illinois, Eastern Division:

Your petitioner, the United States of America, by Charles F. Clyne, United States attorney for the Northern District of Illinois, respectfully represents that on the twenty-seventh day of May, A. D. 1919, at the regular May term, 1919, of said District Court of the United States for the Northern District of Illinois, Eastern Division thereof, a final decision or judgment was entered in said court sustaining the demurrer of the defendant, L. C. Russell, filed to an indictment which the grand jurors of the United States, impaneled and sworn in said District Court of the United States, for said division and district, had returned as a true bill against said L. C. Russell for a violation of section 135 of the Criminal Code of the United States. Your petitioner further represents that the said decision or judgment sustaining said demurrer is based upon the construction of the statute upon which the said indictment is
20 founded, to wit, section 135 of the said Criminal Code.

Your petitioner further represents that as he is advised this court erred in construing said section 135 of the said Criminal Code and erred in sustaining said demurrer because of said construction.

Your petitioner further shows that the act of March 2, 1907, chapter 2564, 34 Statutes at Large 1264, provides "that a writ of error may be taken by and on behalf of the United States from the District or Circuit Courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

Wherefore, your petitioner respectfully prays that a writ of error may be granted by this honorable court to your petitioner, authorizing and directing the presentation of the record herein directly to the Supreme Court of the United States as by law provided, and that the clerk of this court be authorized and directed to certify said record to the Supreme Court of the United States as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected, and full and speedy justice done in the premises.

CHARLES F. CLYNE,
United States Attorney for the Northern District of Illinois, Attorney for Plaintiff.

Dated: Chicago, Illinois,
May —, A. D. 1919.

21 (Endorsed:) No. 6311. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. L. C. Russell. Petition. Filed May 27, 1919, at — o'clock — M. T. C. MacMillan, clerk. Charles F. Clyne, United States attorney.

22 And afterwards, to wit, on the 27th day of May, A. D. 1919, there was filed in the clerk's office of said court, in the above entitled cause, an assignment of errors; same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

In the District Court thereof, May term, A. D. 1919, *ss.*

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Assignment of errors.

Now comes the United States of America by Charles F. Clyne, United States attorney for the Northern District of Illinois, and says that in the aforesaid proceedings and in the decision and judg-

ment of the said court sustaining the demurrer of the defendant, L. C. Russell, to the indictment herein, there is manifest error in this, to wit:

(1) The District Court erred in sustaining the demurrer to the indictment and to each count thereof.

(2) The District Court erred in construing the statute upon which the indictment is founded.

(3) The District Court erred in rendering judgment in favor of the defendant and against the plaintiff, based upon a construction of the statute upon which the indictment is founded.

(4) The District Court erred in entering judgment in favor of the defendant and against the plaintiff.

23 Wherefore the said United States of America, plaintiff, prays that the aforesaid judgment may be reversed.

CHARLES H. CLYNE,
United States Attorney for the Northern District of Illinois, Attorney for Plaintiff.

Dated this — day of May, A. D. 1919.

(Endorsed:) No. 6311. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. L. C. Russell. Assignment of Errors. Filed May 27, 1919, at — o'clock — m. T. C. MacMillan, clerk.

24 And afterwards, to wit, on the 27th day of May, A. D. 1919, there was filed in the clerk's office of said court, in the above entitled cause, a præcipe for writ of error; same being in the words and figures following, to wit:

United States of America, Northern District of Ilinois, Eastern Division.

In the District Court thereof, May term, A. D. 1919, *ss.*

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Præcipe for writ of error.

To THOMAS C. MACMILLAN, Esq.,
Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Please prepare a certified copy of the indictment and the demurrer to said indictment and the record of the court in the above-entitled cause with reference to said demurrer, to be transmitted with a writ of error issued out of the Supreme Court of the United States in conformity with the provisions of the act of March 2, 1907, 34 Stat.

1246, permitting and authorizing the issuance of writs of error in such cases.

CHARLES F. CLYNE,
United States Attorney for the Northern District of Illinois, Attorney for Plaintiff.

25 Dated: Chicago, Illinois, May —, A. D. 1919.

(Endorsed:) No. 6311. The District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. L. C. Russell. Præcipe for writ of error. Filed May 27, 1919, at — o'clock — m. T. C. MacMillan, clerk.

26 And afterwards, to wit, on the 25th day of June, A. D. 1919, there was filed in the clerk's office of said court, in the above-entitled cause, a notice, same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

In the District Court thereof, June term, A. D. 1919, *ss.*

UNITED STATES OF AMERICA
vs.
L. C. RUSSELL. } No. 6311.

Notice.

To OTTO CHRISTENSEN, Esq.,
1101–19 South La Salle Street, Chicago, Illinois.

Please take notice that on Wednesday, June 25, 1919, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I shall appear before the Honorable George A. Carpenter, judge of the District Court of the United States for the Northern District of Illinois, in the room usually occupied by him as a courtroom, in the Federal Building, Chicago, Illinois, and ask leave to file a further assignment of error in the above-entitled cause, and for an order directing the issuance of an additional citation to the Supreme Court of the United States, and for an order enlarging the time within which the record in the above-entitled cause shall be filed with the clerk of the Supreme Court of the United States to July 26, 1919; at which time and place you may appear if you so desire.

CHARLES F. CLYNE,
United States Attorney.

Received a copy of the above notice this 24th day of June, A. D. 1919.

27 STATE OF ILLINOIS,
County of Cook, ss:

Nicholas Stolfo, being first duly sworn, on oath deposes and says that he served the attached notice upon Otto Christensen, Esq., at his

office, room 1101 Number 19 South La Salle Street, Chicago, Illinois, on Tuesday, June 24, 1919, before 4 o'clock p. m., by leaving a true copy thereof with Harry L. Solomon, a person in charge of the office of said Otto Christensen, Esq.

NICHOLAS STOLFO.

Subscribed and sworn to before me this 24th day of June, A. D. 1919.

[SEAL.]

WILLIAM A. SMALL,
Notary Public.

(Endorsed:) No. 6311. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America *vs.* L. C. Russell. Notice. Filed Jun. 25, 1919, at — o'clock — M. T. C. MacMillan, clerk.

28 And afterwards, to wit, on the 25th day of June, A. D. 1919, the following order was had and entered of record in said cause before the Honorable George A. Carpenter, judge, to wit:

THE UNITED STATES
vs.
L. C. RUSSELL. } No. 6311.

On motion of the United States of America, by Charles F. Clyne, United States attorney for the Northern District of Illinois, and upon notice duly served upon counsel for L. C. Russell, the defendant in the above-entitled cause, leave is hereby granted the United States of America to file in said cause a further assignment of error; and

It is further ordered that an additional citation to the Supreme Court of the United States be issued in the above-entitled cause.

It is further ordered that the time within which a record in the above-entitled cause should be filed with the clerk of the Supreme Court of the United States be, and the same is hereby, enlarged to and including July 26, 1919.

29 And afterwards, to wit, on the 25th day of June, A. D. 1919, there was filed in the clerk's office of said court in the above-entitled cause a further assignment of errors, same being in the words and figures following, to wit:

In the District Court of the United States of America for the Northern District of Illinois, eastern division.

Of the June term, in the year 1919.

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Further assignment of error.

Now comes the United States of America, by Charles F. Clyne, United States attorney for the Northern District of Illinois, and

says that in the proceedings in the above-entitled cause there is manifest error in this; that the court erred in the decision and judgment sustaining the demurrer to the indictment in said cause, and to each count thereof, based upon a construction of the statute upon which the indictment was founded, in holding that there was no statute of the United States making the matters charged in the indictment a crime.

Wherefore said United States further prays that the aforesaid judgment may be reversed.

CHARLES F. CLYNE,
United States Attorney for the Northern District of Illinois.

Dated this 25th day of June, A. D. 1919.

(Endorsed:) No. 6311. In the District Court of the United States for the Northern District of Illinois, eastern division. United
30 States of America vs. L. C. Russell. Further assignment of error. Filed Jun. 25, 1919, at — o'clock — m. T. C. MacMillan, clerk.

31 And afterwards, to wit, on the 27th day of June, A. D. 1919, there was filed in the clerk's office of said court, in the above entitled cause, an additional præcipe for writ of error; same being in the words and figures following, to wit:

United States of America, Northern District of Illinois, Eastern Division.

In the District Court thereof, June term, A. D. 1919, *ss.*

UNITED STATES OF AMERICA
v.
L. C. RUSSELL. } No. 6311.

Additional præcipe for writ of error.

To THOMAS C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Please prepare a certified copy of the record of the court in the above entitled cause, including therein the following:

1. May 1, 1918, order to file indictment and for bench warrant.
2. May 1, 1918, indictment.
3. May 1, 1918, bench warrant and return thereon.
4. July 12, 1918, præcipe for certified copy of indictment.
5. September 12, 1918, plea of not guilty.
6. November 19, 1918, order granting leave to withdraw plea of not guilty and file demurrer.

7. November 19, 1918, demurrer.
8. May 6, 1919, order taking demurrer under advisement.
9. May 27, 1919, certificate of district judge.
10. May 27, 1919, petition for writ of error to Supreme Court.
10-a. May 27, 1919, order sustaining demurrer and dismissing indictment.

32 11. May 27, 1919, assignment of errors.

12. May 27, 1919, præcipe of United States attorney for record.
13. May 27, 1919, writ of error.
14. May 27, 1919, citation.
15. June 25, 1919, notice of motion for leave to file further assignment of error, and for order directing issuance of additional citation, and for enlarging time to file record in the Supreme Court.
16. Order granting leave to file further assignment of error, directing issuance of additional citation, and extending time to file record in the Supreme Court.
17. Further assignment of error.
18. Additional citation.
19. Additional præcipe for writ of error.

CHARLES F. CLYNE,
United States Attorney
for the Northern District of Illinois.

Received copy of additional præcipe for writ of error this 27th day of June, A. D. 1919.

OTTO CHRISTENSEN,
Attorney for Defendant.

(Endorsed:) No. 6311. In the District Court of the United States for the Northern District of Illinois, Eastern Division. United States of America vs. L. C. Russell. Additional præcipe for writ of error. Filed Jun. 27, 1919, at — o'clock — m. T. C. MacMillan, clerk.

33 In the District Court of the United States of America, for the Northern District of Illinois, Eastern Division.

I, John H. R. Jamar, clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true, complete, and correct transcript of the record in case Number 6311, wherein The United States is plaintiff and L. C. Russell is defendant, prepared in accordance with præcipe filed herein, as same appears from the originals filed in said cause and now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, at Chicago, in said district, this 8th day of July, A. D. 1919.

[SEAL.]

JOHN H. R. JAMAR,
Clerk.

34 UNITED STATES OF AMERICA, ss.

The President of the United States to L. C. Russell, Chicago, Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, judge of the District Court of the United States, this 27th day of May, in the year of our Lord one thousand nine hundred and nineteen.

GEORGE A. CARPENTER,
Judge of the United States District Court
for the Northern District of Illinois.

34½ On this 28th day of May, in the year of our Lord one thousand nine hundred and nineteen, personally appeared Thomas Hennebry before me, the subscriber, a notary public, in the county of Cook, State of Illinois, and makes oath that he delivered a true copy of the within citation to L. C. Russell by delivering a true copy thereof to Otto Christensen, Esq., his attorney, in the aforesaid cause, on said 28th day of May, in the year nineteen hundred and nineteen.

THOMAS HENNEBRY,
U. S. Deputy Marshal.

Sworn to and subscribed the 29th day of May, A. D. 1919.
[SEAL.] WILLIAM A. SMALL,
Notary Public.

(Endorsed:) No. 6311. Supreme Court of the United States. United States of America vs. L. C. Russell. Citation to the Supreme Court of the United States. Filed Jun. 2, 1919, at — o'clock —m. T. C. MacMillan, clerk.

35 UNITED STATES OF AMERICA, ss:

The President of the United States, to L. C. Russell, Chicago, Illinois, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for

the Northern District of Illinois, Eastern Division, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, judge of the District Court of the United States, this 25th day of June, in the year of our Lord one thousand nine hundred and nineteen.

GEORGE A. CARPENTER,
Judge of the United States District Court
for the Northern District of Illinois.

Service of the above citation is hereby accepted by L. C. Russell by Otto Christensen, his attorney.

Dated: Chicago, Illinois, June —, 1919.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, or some of you, between the United States of America, plaintiff, and L. C. Russell, defendant, No. 6311, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of May, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.]

T. S. MACMILLAN,
Clerk of the District Court of the United States
for the Northern Dist. of Illinois.

Allowed by

CARPENTER,
Dist. Judge.

37 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 8th day of July, A. D. 1919.

JOHN H. R. JAMAR,
Clerk United States District Court,
Northern District of Illinois.

6211. Supreme Court of the United States. The United States of America vs. L. C. Russell. Writ of error. Copy deposited for the defendant in error in the clerk's office, U. S. District Court, Northern District of Illinois.

38 (Endorsed on cover:) File No. 27212, N. Illinois, D. C. U. S. Term No. 457. The United States of America, plaintiff in error, vs. L. C. Russell. Filed July 22d, 1919. File No. 27212.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
L. C. RUSSELL.
No. 143.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

NATURE OF PROCEEDING.

The case comes here by direct writ of error under the criminal appeals act of March 2, 1907 (c. 2564, 34 Stat. 1246), on the ground that the court, in sustaining a demurrer to the indictment, based its decision on the construction of section 135 of the Criminal Code. The district judge certified (R. 8, 9) that no question of the interpretation of the indictment was involved.

STATUTE.

Section 135, Criminal Code, provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate,

> or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

INDICTMENT.

The indictment (R. 1–3) alleged that one William D. Russell had been summoned, as the defendant knew, to attend as a petit juror of the United States District Court for the Northern District of Illinois on April 3, 1918, at a time when the trial of a criminal prosecution against William D. Haywood and others was to begin in said court. With intent corruptly to induce William D. Russell to favor the acquittal of William D. Haywood and others, the defendant, on April 1, 1918, called at the home of William D. Russell, where he saw said Russell's wife, and in the course of his conversation with her, he told her—

> that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards

> said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; * * *

In the first count of the indictment this action of the defendant is charged as a corrupt "endeavor to influence" the juror in violation of the first clause of section 135, Criminal Code. In the second count it is charged that by said action the defendant did corruptly influence, obstruct, and impede the due administration of justice in said District Court, in violation of the latter clause of section 135, Criminal Code.

ASSIGNMENT OF ERROR.

The error assigned (R. 13, 14) is that the lower court—

> erred in the decision and judgment sustaining the demurrer to the indictment in said cause, and to each count thereof, based upon a construction of the statute upon which the indictment was founded, in holding that there was no statute of the United States making the matters charged in the indictment a crime.

ARGUMENT.

The record does not show that the judge was of opinion that the facts charged in the first count of the indictment merely showed *preparation* for the

committing of the offense there charged; but, anticipating that counsel for the defendant in error will make the same points which he made in the court below, we proceed to comment upon the distinction between "endeavor" and "preparation," to maintain that the facts in this case show something more than mere preparation, and to comment upon other questions likely to be presented.

If the charge had been that defendant attempted to *bribe* the juror (not, by the way, an offense under any statute), the act of going to the wife and urging her as his agent to ascertain how the juror, her husband, felt toward the persons to be tried by the juror would perhaps be only preparation for bribing. But the charge in the first count, following the statute, was that defendant, by making the statements and request specified, *endeavored to influence* the juror.

The charge in the second count was that defendant, by doing the things specified in the first count, did influence, obstruct, and impede the due administration of justice in the court.

We contend, as to the first question, that whether the actions of defendant, charged in the indictment, amounted to an endeavor to influence the juror or not, was a question to be decided by a jury, and not a question to be disposed of finally on demurrer.

The jury was the proper body to judge, from the appearance of the wife on the stand, whether or not she was an innocent agent of defendant, and how

inevitable it was that she would do as defendant requested her to do; and so the jury should have been allowed to hear the evidence in support of the charge, and to decide whether defendant endeavored to influence the juror by doing what he did, or influenced, impeded, or obstructed justice; or whether defendant was only preparing to do these things.

Of course it is plain from the indictment (R. 2) that defendant's request to the wife to ascertain how her husband felt toward the persons on trial was a mere pretense. This appears from the fact that defendant said that his reason for wanting this information was that the persons on trial "did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal." This was obviously defendant's way of conveying an offer of money to the juror *to* favor the persons to be tried. The indictment charges that in doing this he endeavored to influence the juror.

If the juror was already favorable to the persons on trial, it would not be necessary to pay him to be so. The fact that money was mentioned shows that defendant wanted to influence the juror by talk of money, whether or not he really intended to pay the juror anything.

We contend that the court could not say in advance of the trial that the juror could not be influenced in this way; and that as such conduct as that of defendant described in the indictment could have no lawful excuse, the court should have held

"the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes" in passing upon the question whether "preparation," on the one hand, or "endeavor," on the other, was disclosed by the allegations of the indictment. The words just quoted are from the opinion of Chief Justice Holmes in *Commonwealth* v. *Kennedy* (170 Mass. 18), hereinafter quoted at length.

Of course the first count, as was necessary in charging an endeavor, which is no other than an attempt, did not show completion of the offense.

Bishop, in Vol. I of his *New Criminal Law*, shows what "attempt" and "endeavor" are.

> SECTION 435. 1. *Attempt.*—Whenever a man intending to commit a particular crime, does an act toward it, but is interrupted or some accident intervenes so that he fails to accomplish what he meant, he is still punishable. This is called a criminal attempt. And by this name "attempt" the language of our American law designates every indictable act of the like sort. But—
>
> 2. *Endeavor short of attempt.*—The English courts refine more nicely. They appear to term an act toward doing the criminal thing an attempt only when it is closely proximate to the substantive crime meant. But they will sustain a common-law indictment for an "endeavor" not thus proximate, while our courts will do the same, but call it an "attempt."

> SECTION 436. *Magnitude of the act—Proximity.*—Our law in the criminal department, the same as in the civil, does not take cognizance of things trifling and small. Two questions concerning the act are always to be considered together—first, whether it is of the sort which the criminal law takes cognizance of; secondly, whether, being such, it has proceeded far enough for the law's notice. And it must go more or less far—be nearer or less near to the end meant—according as it is more or less intensely criminal in its nature.

In *People* v. *Murray* (14 Calif. 159, 160), Chief Justice Field said:

> The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: a party may purchase and load a gun with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt.

Although the decisions have since clarified the matter to some extent, there still exists difficulty of the kind pointed out by Judge Deady when he said:

> It is said that the subject of attempt to commit a crime is "less understood by the courts" and "more obscure in the textbooks" than any other branch of the criminal law. (Bish. Crim. Law, sec. 657.) And certainly

> there is none in some respects more intricate and difficult of comprehension. It is almost impossible to comprehend all cases of attempt in a definition that does not necessarily run into a mere enumeration of instances. It is easy to say that there must be a combination of intent and act—an intent to commit a crime and an act done in pursuance of such intent, which falls short of the thing intended. (*United States* v. *Stephens*, 12 Fed. 52, 54.)

We submit that the law of our case is well stated in the language of Chief Justice Holmes in *Commonwealth* v. *Peaslee* (177 Mass. 267):

> Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps can not be described as an attempt, because that word suggests an act seemingly sufficient to accomplish the end, and has been supposed to have no other meaning. (*People* v. *Murray*, 14 Calif. 159, 160.) That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the

> act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime. As was observed in a recent case, the degree of proximity held sufficient may vary with circumstances, including, among other things, the apprehension which the particular crime is calculated to excite. (*Com.* v. *Kennedy*, 170 Mass. 18, 22; 48 N. E. 770. See, also, *Com.* v. *Willard*, 22 Pick. 476.) A few instances of liability of this sort are mentioned on the page cited.

The matter is further developed by Chief Justice Holmes in delivering the opinion of the same court in the case of *Commonwealth* v. *Kennedy* (170 Mass. 18, 22), cited in the *Peaslee case:*

> Notwithstanding Pub. St. c. 210, section 8, we assume that an act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But, on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head was not aimed straight, and therefore, in the course of

nature, could not hit him. Usually, acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. In this case the acts are alleged to have been done with intent that Learoyd should swallow the poison, and, by implication, with intent to kill him. (See *Com.* v. *Adams*, 127 Mass. 15, 17.) Intent imports contemplation, and more or less expectation, of the intended end as the result of the act alleged. If it appeared in the count, as it did in the evidence, that the habits of Learoyd and the other circumstances were such that the defendant's expectation that he would use the cup and swallow the poison was well grounded, there could be no doubt that the defendant's acts were near enough to the intended swallowing of the poison, and, if the dose was large enough to kill, that they were near enough to the accomplishment of the murder. But the grounds of the defendant's expectation are not alleged, and the strongest argument for the defense, as it seems to us, would be that, so far as this count goes, his expectation may have been unfounded and unreasonable. But, in view of the nature of the crime, and the ordinary course of events, we are of opinion that enough is alleged when the defendant's intent is shown. The cup belonged to Learoyd, and the defendant expected that he would use it. To allow him immunity on the ground that this part of his expectation was ill grounded would be as unreasonable as to let a culprit off because he was not warranted in thinking that

his pistol was pointed at the man he tried to shoot. A more important point is that it is not alleged in terms that the dose was large enough to kill, unless we take judicial notice of the probable effect of a teaspoonful of Rough on Rats; and this may be likened to the case of firing a pistol supposed to be loaded with ball, but in fact not so, or to administering an innocent substance supposing it to be poison (*State* v. *Swails*, 8 Ind. 524, and note; *State* v. *Clarissa*, 11 Ala. 57). There is a difference between the case of an attempt and a murder. In the latter case the event shows the dose to have been sufficient, without an express allegation. But we are of opinion that this objection can not be maintained. Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. But analogy does not require this consideration. The case cited as to firing a pistol not loaded with ball has been qualified, at least, by a later decision (*Kunkle* v. *State*, 32 Ind. 220, 229) a case of shooting with shot too small to kill. And even in less serious crimes, especially in view of Pub.

St. c. 210, section 8, impossibility of achievement is not necessarily a defense. For instance, in an attempt to procure an abortion upon a woman not pregnant. (*Com.* v. *Taylor*, 132 Mass. 261; *Com.* v. *Tibbetts*, 157 Mass. 519, 32 N. E. 910.) So in an attempt to pick a pocket which is empty. (*Com.* v. *McDonald*, 5 Cush. 365. See, also, *Com.* v. *Jacobs*, 9 Allen, 274.) In the case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts; e. g., in the case of treason (Fost. Crown Law, 196; *Rex.* v. *Cowper* 5 Mod. 206), or in that of pursuit by a negro with intent to commit rape (*Lewis* v. *State*, 35 Ala. 380). A familiar statutory illustration of this class is to be found in the enactments with regard to having counterfeit bills in one's possession with intent to pass them (Pub. St. c. 204, section 8; see *Roberts' case*, Dears. Crown Cas. 539, 550, 551); and one which is interesting historically in the English statutes intended to keep secret the machinery used in modern manufacture (14 Geo. III. c. 71, section 5; 21 Geo. III c. 37, section 6). The general provision of Pub. St. c. 210, section 8, already referred to, long has been on the books. A case having some bearing on the present is *State* v. *Glover* (27 G. C. 602; 4 S. E. 564). For these reasons we are of opinion that the motion to quash the second count was properly overruled.

Applying the language of the opinions just quoted to the case before us, we contend that it may well be that defendant did not have the courage to talk to the juror himself but chose to talk to the juror's wife expecting her to put the matter to her husband as a necessary and inevitable consequence of the existing relation of husband and wife, and that there was nothing impossible or absurd in defendant's expectation. We contend, also, that defendant really made the proposal to the juror himself, because he used an innocent agent. (*Com.* v. *Hill*, 11 Mass. 135, 136.) At any rate we insist that, because in all human probability what defendant said to the wife would be repeated to the husband, the acts of defendant well constituted an endeavor to influence the husband because of the nearness of the act to the accomplishment of the purpose of defendant.

Note that in the *Peaslee case* above quoted, Chief Justice Holmes (page 56) said that the ground upon which the decision in *People* v. *Murray* was put was too broad.

This court, speaking by Mr. Justice Thompson, in a case upon a statute making it an offense to attempt to fit out and arm any ship with intent that it should be used in foreign service in committing hostilities against a friendly power, said, in answering the contention that there was no offense unless the proof showed arming as well as fitting out (italics ours):

> But an attempt to fit out "and" arm is made an offense; this is certainly doing something short of a complete fitting out and arm-

> ing. To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or *any definite progress toward it; any effort* or *endeavor to effect it, will satisfy the terms of the law.* (*United States* v. *Quincy*, 6 Peters 443,464.)

The second question is whether the count charging the impeding of justice was good. We contend that the question whether defendant's conduct did impede justice was also for the jury, because it is conceivable that it might have done so as a matter of fact. Who can say that it was impossible?

Suppose that the juror, when his wife, as she naturally would, told him what defendant had said to her, reported the matter to the trial judge, or told about it when asked upon his *voir dire* whether anybody had talked to him about the case, or whether he knew of anything which would make it improper for him to act as a juror; and that thereupon the judge had instituted an investigation in court to ascertain what truth there was in the statement of defendant to the juror's wife that he represented the persons on trial, and whether those persons or their attorneys were making it a practice to approach the jurors, and whether, if so, the whole panel should not be discharged; or that the judge discharged the juror anyway because of what had happened, when he might otherwise have been a good juror; would not this have been an obstruction and delay to the due administration of justice? We think it would have been, and that it was for the jury to decide whether it did have the effect charged.

In the case of *United States* v. *Bittinger* (D. C., W. Dist. Mo., Krekel, D. J.), Fed. Cas. No. 14598, the indictment contained counts drawn upon the same provisions of law as was the indictment in the case at bar, the underlying fact being that defendant, by secreting a witness so as to prevent service of a subpœna upon him, endeavored to influence the witness and obstructed justice. The court left the whole matter to the jury, telling them, however, that on the second charge the *proof* should show something besides the secreting of the witness as a means of obstructing justice. The jury found defendant guilty on all counts. We think the court was right in leaving the matter to the jury, but do not agree with his suggestion that secreting a witness would not obstruct justice in the court.

Suppose defendant, in the case at bar, by approaching the juror's wife as he did, tried to get rid of the juror without using a peremptory challenge, or suppose his aim was by this means to procure the discharge of the whole panel, could the court say that such conduct could not "influence, obstruct, and impede the due administration of justice" in the court? We think the court should have permitted the prosecution to prove the charge.

In this connection it should be remembered that the trial in question took place before one district judge while the case of defendant in error came up before another, and that this latter judge could not know of his own knowledge that there was no such delay as that suggested above.

It should be particularly borne in mind that section 135, Criminal Code, on analysis, shows that Congress intended—on account of the serious nature of the offense and its effect on the public welfare—to punish in their early stages acts tending to interfere with or impede justice. There is nothing strange in this. In *Swift & Co.* v. *United States* (196 U. S. 375, 396), the court said, in reference to attempts to monopolize interstate commerce:

> The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to procure a dangerous probability that it will happen. (*Commonwealth* v. *Peaslee*, 177 Mass. 267, 272.) *But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.* [Italics ours.]

Statutes have in other exceptional cases made mere preparation for a crime a substantive offense, as, e. g., the possession of dies for counterfeiting. Attempts to bribe have always at the common law taken their start at an early point in the series of acts effecting

the completed offenses. In *Rex* v. *Vaughan* (1769), 4 Burrows, 2494, a letter which offered to leave security in the hands of a third person for the payment of a sum of money to the person who should procure a certain patent was held an attempt to bribe, although further acts by the defendant himself were necessary to complete the offense—that is, there was a *locus poenatentiae*. Lord Mansfield said:

> A terrible consequence would result to the public if everything that such an officer is concerned in advising the disposal of should be set up to sale.

And Justice Yates said:

> If it be but questionable, it ought to be inquired into. 'Tis a matter fit for inquiry.

To the same effect are *Rex* v. *Plympton* (2 Lord Raymond, 1377); *Rex* v. *Isherwood* (2 Lord Kenyon, 202); *Rex* v. *Gurney* (10 Cox C. C. 550); *State* v. *Ellis* (33 New Jersey Law, 102).

In *United States* v. *Worrall* (1798), 2 Dallas, 384; *Wharton's State Trials*, 139, the *mailing* of a letter offering to share the profits of a certain contract, if awarded, with the Commissioner of Internal Revenue was held (in effect) an attempt to bribe, though the prosecution should not have been entertained for lack of a Federal statute creating the offense.

It thus appears that when there is a question of the corrupt interference with public officials—and especially of justice—the law, on account of the necessity of keeping such matters, as far as possible, beyond even suspicion, starts at an earlier point in

actions tending toward the evil result than it does in the case of offenses less dangerous to the public generally, less liable to affect the sources themselves of public administration.

It is therefore not surprising to find that section 135, Criminal Code, when carefully analyzed, shows an intent on the part of Congress to go as far back as can *safely* be done in punishing attempts to interfere with the course of justice in Federal courts, and there is no reason of public policy which should induce this court not to give a liberal construction to the language of the section in order to carry out that intent, provided the defendant be not punished for acts which were so trivial and remote as not to be justly noticeable by the law.

As to the first part of section 135, on which the first count of the indictment was based, it should be noted:

1. That the statute uses the word "endeavor," and while one of the synonyms of this word is "attempt," it nevertheless has a shade of meaning more favorable to an earlier stage in the causal series than "attempt."

2. The consummated offense toward which the "endeavor" is directed is not the bribery or corruption of the court or jury or witnesses but the "influencing" of them. To "influence" is to produce an effect upon, to disturb, to move, as a stone thrown into the water which stirs its surface and muddies its depths. Thus the consummated offense which section 135 has in mind is itself (in a sense) prelimi-

nary or merely significant of the real corruption or poisoning of the sources of public justice which is the evil actually dreaded. But so sensitive is the subject matter deemed by the law that the statute punishes, not merely the agitation of the courts out of their true orbit, but even an "endeavor" to bring about such a result.

We claim, therefore, that cases which have held certain acts to be mere "preparations" and not therefore "attempts," even if they were correctly decided, are not controlling as to a statute containing such language as is in section 135. Neither are cases controlling, even if correctly decided, which hold that an "attempt" must be something which would have succeeded were it not for causes extraneous to the actor; for when it comes to an "endeavor" to "influence" a juror or a court, mere ground baiting, or dropping the net may be enough to satisfy the statute, though to catch the fish would require more which in fact was never done.

Giving the statute the construction claimed above, what are the facts of the present case as charged in the indictment? In the first place defendant went to the juror's house and made his remarks to the juror's wife. It must be assumed on demurrer that the wife would repeat the remarks to the juror—that the wife and husband are one *pro hac vice*—and therefore that the case is the same, on demurrer, as though the defendant had made the remarks to the juror himself at his residence. On

this assumption the indictment must be taken to allege that the defendant went to the juror's residence and inquired of him what his attitude would be towards the defendants in the *Haywood case*, stating, as his reason for the inquiry, that the defendants in that case did not wish to pay any money to the jurors unless they knew the jurors so paid would favor their acquittal.

In the second place, making the above assumption, the words so uttered by the defendant must be construed, on demurrer, as an offer to pay money to the juror if he would be favorable to the acquittal of the defendants in the pending prosecution, for the reason that such a construction could reasonably be placed upon the words by a jury, whose action within their proper sphere must not be forestalled by final disposition of the case on demurrer.

On analysis, therefore, it appears that the question in the case at bar is whether an offer to bribe a juror in a pending cause is an "endeavor" to "influence" him within the meaning of section 135, Criminal Code, or an "obstructing" or "impeding" of justice within the meaning of the same section.

It is difficult to see how there can be any doubt that it is both of these things. It is settled that the juror or court need not be in fact influenced in the manner intended. In *State* v. *Carpenter* (20 Verm. 9, 12), the court said:

> To thwart or obstruct the due administration of justice by violence, bribery, threats, or other lawful means, whether in preventing the

attendance of witnesses, jurymen, or other officers of court, is a high handed offense, which strikes at the vitals of judicial proceedings, and subjects to severe animadversion in every well ordered community. The attempt to commit such an act, it is well settled, is itself a substantive offense, punishable by the common law.

In this instance, the attempt was unsuccessful; the witness, Warren, attended court and testified before the grand jury, as he had bound himself by recognizance to do. Moreover, the parties, against whom he appeared, must be taken to have been innocent of the crime imputed to them; and, in addition to this, the indictment against them, if in the description of the offense it followed the complaint preferred before the magistrate, I am inclined to think was fatally defective. Still, all these circumstances are entirely consistent with the respondent's guilt.

In *Walsh* v. *The People* (65 Ill. 58, 60) the court said:

Why is the mere unsuccessful attempt to bribe criminal? The officer refuses to take the offered reward, and his integrity is untouched—his conduct uninfluenced by it. The reason for the law is plain. The offer is a sore temptation to the weak or the depraved. It tends to corrupt, and, as the law abhors the least tendency to corruption, it punishes the act which is calculated to debase, and which may affect prejudicially the morals of the community.

To the same effect is *Commonwealth* v. *Murray* (135 Mass. 530, 532) and other cases which might be cited. The rule is as ancient as it is well settled. In *Rex* v. *Vaughan*, *supra*, Lord Mansfield cited *Coke's 3 Institute* 147, for the statement:

> If a party offers a bribe to a judge, meaning to corrupt him in a case depending before him; and the judge taketh it not; yet this is an offense punishable by law, in the party that offers it.

(And see *Light's Case* (1915), 11 Crim. App. Cas. 111, 113.)

Sounding a juror as to his susceptibility to bribery is an "endeavor" to "influence" him, though nothing more be done, for it is an endeavor to muddy the waters, which is sufficient. It is not the escape of the particular criminal which the law is afraid of, but the injury to public justice in general if jurors are tampered with. It is only necessary to imagine numbers of persons approaching each of the jurors in a cause with conversations about their attitude toward the parties, innuendoes as to what they might expect if they decided one way or another, etc., to see the necessity for making the approach to jurors without legitimate excuse unlawful, as section 135, Criminal Code, does. Therefore, a conversation with a juror (or a juror's wife) about the payment of money to those jurors voting a certain way is both an endeavor to influence the juror, and an actual influencing of the *due* (i. e., proper) *administration* of justice.

Certain recent English cases furnish examples which may aid, although every case depends somewhat on the particular facts, the statute under consideration (if there be a statute), and the nature of the crime an attempt to commit which is charged.

In England the definition given by Stephen in Chapter V, article 49 of his *Digest of Criminal Law* seems to be approved by the judges:

> An attempt to commit a crime is an act done with intent to commit that crime; and forming part of a series of acts which would constitute its actual commission if it were not interrupted.
>
> The point at which such a series of acts begins can not be defined; but depends upon the circumstances of each particular case.

It will be noted, however, that the latter paragraph of this definition leaves the main difficulty unsolved.

In *Laitwood's case* (1910), 4 Crim. App. Cas. 248, the defendant was indicted for attempting to obtain money under false pretenses. He represented to I that he had an established business, where there was a good opening for a young man, but that an applicant for a situation with it would have to invest £100 in the debentures of the company. He made no further attempt to get, nor did he get the money. The court held that while the case was near the line the defendant was rightly convicted. In this case the Draft Code definition of an attempt is quoted as follows:

> An act done or omitted with intent to commit that offense forming part of a series of acts or omissions which would have constituted

> the offense if such a series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offense or by some other cause.

It will be observed that this Draft Code definition (which was adopted by the court in *Laitwood's case*) clarifies Stephens's definition by including, as one of the causes of the failure of the attempt "the voluntary determination of the offender."

This, though contrary to the statement of Chief Justice Field in *People* v. *Murray* (14 Calif. 159, 160) seems to be in accordance with the view of Justice Holmes as expressed in the opinion of the court in *Commonwealth* v. *Peaslee* (177 Mass. 267, *supra*).

In *White's case* (1910), 4 Crim. App. Cas. 257, 271, the defendant had put a glass containing 2 grains of cyanide of potassium by his mother's couch, but, though she was found dead, she had not taken the poison, nor would 2 grains be sufficient to kill. He was held rightly convicted of an attempt to murder. The court said:

> There seems no doubt that the learned judge in effect did tell the jury that if there was a case of slow poisoning the appellant would be guilty of the attempt to murder. We are of opinion that this direction was right, and that the completion of one of a series of acts intended by a man to result in killing is an attempt to murder, even although this completed act would not, unless followed by the other acts, result in killing. It might be the

beginning of the attempt, but would none the less be an attempt.[1]

In *Robinson's Case* (1915) 11 Crim. App. Cas. 124 the defendant was convicted of an attempt to obtain money by false pretenses from Lloyd's Insurance Agency. Being insured against burglary, he removed his jewelry from his safe, tied himself and represented to the police that he had been robbed. The deception being immediately discovered, he was arrested. The court, in quashing the conviction, said:

> Now in this case the difficulty is that there is no evidence of any act done by the appellant which ever reached the underwriters. They were the people whose minds were to be affected and who were to be induced to part with their money. There is no evidence of any communication between the appellant and the underwriters or any agent of theirs; the policeman can not be said to have been acting for the underwriters. The truth is that this was preparation of evidence for the commission of the crime, and not a step taken with a view to the commission of the crime. Appellant was preparing the evidence that would be required to give color to the story which he intended falsely to present. If the police had reported the burglary it might well have been that the underwriters would have been satisfied without making further enquiries, but there must have been first some

[1] This case may be compared with *Commonwealth* v. *Kennedy* (170 Mass. 18, *supra*).

> act on the part of the appellant in making a claim upon them. It is there that we think the case fails, and applying the principle of Parke B, we think it was an act remotely leading to the commission of the offense, and not an act immediately connected with it.[2]

Reference, in addition to the above, to three cases in this country as aiding consideration of the case at bar may be pardoned. In *People* v. *Murray* (14 Calif. 159, 160) the defendant was indicted for an attempt to contract an incestuous marriage. He had eloped with his niece and had procured a minister for the marriage, but had gone no further. It was held that these acts were mere preparations and did not constitute an attempt. The decision was placed on the rule referred to above as too narrow according to the English authorities, viz, that there can not be an attempt if there be a *locus poenatentiae*, but it is not certain that the case would not have been rightly decided the same way if a broader rule had been applied. In *United States* v. *Stephens* (12 Fed. 52) the defendant was charged with an attempt to introduce spirituous liquors into Alaska. The defendant in Alaska wrote to a firm of liquor dealers in San Francisco requesting them to ship and send to him in Alaska 100 gallons of whisky. This was held merely a preparation and not an attempt, but the force of the decision is weakened by the court's assumption throughout (12 Fed. 56) that the letter was

[2] This case should be compared with *Commonwealth* v. *Peaslee* (177 Mass. 267, *supra*).

nothing more than an offer to purchase whisky in San Francisco, whereas in fact it was not merely an offer to purchase, but also an order to ship to Alaska. In *State* v. *Hurley* (79 Verm. 28) the defendant was charged with attempting to break jail. A person outside the jail threw to defendant a bundle of hack saws; the defendant got the saws in his hands, but was discovered and ordered to drop the saws by the jailer, which he did. The information was quashed, the court saying:

> The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

In some of the cases, e. g., *Rex* v. *Taylor* (1 F. & F. 511), a case of attempted arson, the test is said to be whether the acts done are in themselves neutral and of an innocent character, being made evil merely by the intent of the actor; but such a test would not

explain *Robinson's case, supra, People* v. *Murray, supra, State* v. *Hurley, supra,* nor *Commonwealth* v. *Peaslee, supra,* in all of which the acts done showed on their face the crime towards which they were directed, but were held nevertheless to be preparation merely.[3]

The following suggestion may be ventured, on the analogy of the drama. The stage setting, while a condition precedent to the performance of the play, is not itself the play, nor even the beginning of it. But as soon as the curtain rises and the first actor appears the attempt has begun to represent the drama to be completed when the curtain falls, though one or all of the actors may, for one or another reason, refuse to go on. It will be observed that there is a pause after the stage setting is complete, and before the play is begun. It seems that in reality there are two intents (whether conscious or not is immaterial), with appropriate series of acts, although the one is included in and is conditional on the other; viz, the intent to prepare the stage as an independent completed end, and the intent to act the play.

So in real life, where the acts of the person charged with an attempt to commit a defined crime are merely directed to setting the stage, after which a pause is contemplated before the crime itself is attempted,

[3] See also for a discussion of the principles involved *People* v. *Sullivan* (173 N. Y. 122, 133–136), the dissenting opinion of Grant, C. J., in *People* v. *Youngs* (122 Mich. 292, 295, *et seq.*), and the article by Professor Beale on *Criminal Attempts* (16 Harvard Law Rev. 491).

they are merely preparations. Where, however, they are more than this and, coming after the stage is prepared, are the beginning of a series of causes the natural effect of which is the defined crime, they are attempts, though they be merely the first steps in the series. The stage setting, however, may occupy a relatively large field and the play a relatively small one, or vice versa, depending on the nature of the crime, or of the statute creating it. For example, murder by violence is an instant business, though the preparation for it may cover a considerable period. Hence an attempt to commit a violent murder can hardly be said to have begun so long as there is a *locus poenatentiæ*. A man lying in wait with a loaded firearm may still be said to have done nothing more than pave the way. Where, however, the case is one of murder by slow poisoning, the drama itself has several acts, and the placing of a small amount of poison where the victim is likely to take it may be held to constitute an attempt. The distinction here suggested would (we believe) explain most of the cases cited above. If applied to the case at bar, it would (we submit) sustain the indictment. "Influencing" a juror or court is like slow poisoning, not like murder by violence. It is continuous and (more or less) impalpable. The stage setting would be confined to such matters as inquiries about the jurors or court, their character, the best methods of reaching them, etc. When, however, these inquiries have been

finished and communication with the juror or court has been opened, the attempt has begun. It is like communication with the underwriters which was held essential in *Robinson's case, supra.*

There is no repugnancy between the first count, charging an endeavor to influence the juror, and the second count, which charges the obstructing of justice in court, because both might have been done at the same time and by the same conduct, and defendant's conduct might have delayed the court if it did not influence the juror, and it might have influenced the juror without delaying the court, although it is difficult to believe that influencing a juror improperly does not necessarily and always *influence* the administration of justice in the court within the meaning of section 135 of the Criminal Code.

CONCLUSION.

We respectfully submit that the court below erred in the way assigned, that both counts should have been held good upon demurrer; and that the judgment should, therefore, be reversed.

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NO. 143

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

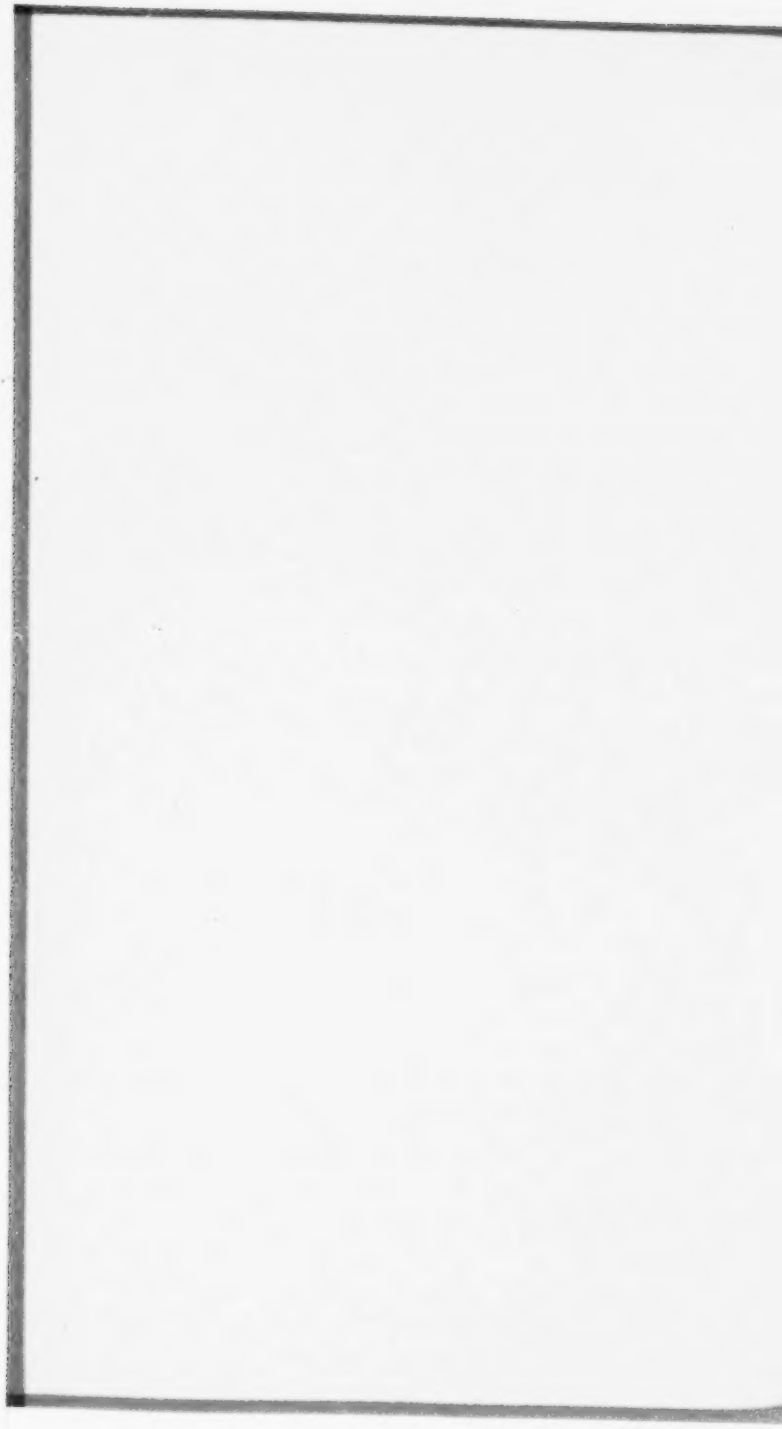
L. C. RUSSELL,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

OTTO CHRISTENSEN,
ATTORNEY FOR DEFENDANT IN ERROR.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1920.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
L. C. RUSSELL,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

ARGUMENT.

The first count of the indictment charges that the defendant "did corruptly endeavor to influence one William D. Russell," summoned to attend as a petit juror in the District Court on the 3rd of April, 1918, "in the discharge of his duty as such petit juror." And the second count of the indictment charges that the defendant "did corruptly influence, obstruct and impede the due administration of justice in said District Court."

The facts recited in the indictment to sustain these two charges were that the defendant, two days prior to the day that the prospective petit juror had been summoned to attend the District Court, called at his home and there met his wife, with whom he had a conversation as follows: First, he requested her to question her husband

as to his attitude toward one William D. Haywood and his co-defendants and report the result of such questioning to him, and, secondly, he further stated to the wife "they did not want to pay money to any of the petit jurors * * * unless they knew such petit jurors would favor their acquittal." The Court below in its certificate of opinion (Rec. 8) states "I was of the opinion that there was no statute of the United States making the matters charged in the indictment a crime."

The foregoing conversation, which forms the basis of the charge, upon analysis, shows, *first,* it was had with a third person and not the juror; *second,* the request to the third person was that she *only* question the prospective juror as to his "attitude" toward said Haywood, *et al.* There was no direction to do anything further than to find out what his attitude was towards the defendants. The third person was not authorized or requested to approach the juror in any way; *third,* the statement that "they did not want to pay money to any of the petit jurors * * * unless they * * * would favor their acquittal" was only a communication to a third person and, as is alleged in the indictment, was assigned as the reason for the defendant desiring to ascertain the attitude of the petit juror toward *Haywood, et al.*

The query to our mind, then, is, are the offenses charged in the indictment established by facts that a defendant *solicited a third person* to interrogate a prospective juror as to his attitude toward certain defendants because "they" (the defendants) did not want to pay money to jurors unfavorable to an acquittal? Does this constitute an "attempt" or "endeavor" on the part of such person to commit the crime charged? As we view it, this only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation. It stands here as the bare representa-

tion to a third person to act for this defendant in ascertaining the juror's attitude toward certain defendants, and not accepted. By the most strained construction this could be interpreted only, and this we seriously question, to be *preparation* for an "endeavor" or "attempt" to influence the juror, but falls far short of an actual endeavor to do so.

Bouvier, Volume I, Edition 1897, page 190, contains the following definitions of "attempt" and "endeavor":

> "**Attempt in Criminal Law.** An endeavor to accomplish a crime *carried beyond mere preparation but falling short of execution of the ultimate design in any part of it.*" (5 Cushing 367; 26 Ga. 493).
>
> "An act *immediately* and *directly* tending to the execution of the principal crime and committed by the person under such circumstances that he has the power of carrying his intention into execution." (1 Bishop Criminal Law, 749).

In the case of *People* v. *Murray* (14 California 159), a case frequently cited by the courts, Chief Justice Field said:

> "It shows very clearly the intention of the defendant, but something more than mere intention is necessary to constitute the offense charged. *Between preparation for the attempt and the attempt itself, there is a wide difference.* The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt. For the preparation, he may be held to keep the peace; but he is not chargeable with any attempt to kill. So in the present case, the declarations, and elopement, and request for a magistrate, were preparatory to the marriage; but until the officer was engaged, and the parties stood before him,

ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made. *The attempt contemplated by the statute must be manifest by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.*" (Italics our own.)

In the case of *United States* v. *Stephens* (12 Fed. 52), it was held that a person resident in Alaska who ordered one hundred gallons of whiskey to be shipped to him in Alaska by a wholesaler dealer in San Francisco, who had the whiskey on hand and for sale, with intent to introduce the same into Alaska, was not guilty of an attempt, under Section 20 of the Act of June 30, 1834, making it a crime to attempt to introduce spirituous liquors or wine into Alaska. At Page 54 the Court said:

"There are a class of acts which may be fairly said to be done in pursuance of or in combination with an intent to commit a crime, but are not in a legal sense a part of it, and therefore do not with such intent constitute an indictable attempt; for instance, the purchase of a gun with a design to commit murder, or the purchase of poison with the same intent. These are considered in the nature of *preliminary preparations*—conditions, not causes—and, although co-existent with a guilty intent, are indifferent in their character, and do not advance the conduct of the party beyond the sphere of mere intent. They are, it is true, the necessary conditions, without which the shooting or poisoning could not take place, but they are not in the eye of the law the cause of either. 1 Whart. Crim. Law, Sections 178, 181; 1 Bish. Crim. Law, Section 668 et seq.; *People* v. *Murray*, 14 Cal. 160. (Italics our own.)

Dr. Wharton says (*supra*, Section 181): 'To make the act an indictable attempt it must be a *cause*, as distinguished from a *condition;* and it must go so far that it would result in the crime unless frustrated by extraneous circumstances.' "

In the case of *Hicks* v. *Commonwealth* (86 Va. 223), the charge was an attempt to administer poison. Justice P. Lewis, in delivering the opinion of the Court, said: (Italics our own.)

> "The principal witness for the commonwealth was Mrs. Laura Long, whose uncontradicted evidence is substantially as follows: That on several occasions, at the house of the witness in Pulaski County, the first being on the 31st of August, 1888, the prisoner spoke to her about poisoning 'old man Anderson,' and said he knew Mrs. Price would approve it, as she had proposed to him (Hicks) to poison him.
>
> On the 18th of September the prisoner passed the house of the witness on his way to Central to get the poison, saying to her as he passed, that Mrs. Price had given him the money to buy it with. On his return, he stopped at the house of the witness and showed her the poison he had purchased. It was wrapped up in a paper, which was inside of an envelope, 'which had on it a skull and bones and reading.' It was strychnine, and he said he had gotten it that day at a drug store at Central. He told the witness he wanted her to go with him to the spring, near by, where Mrs. Price would meet them and deliver the poison to her and tell her all about it. The witness said she could not go then, but would meet them there that night about 8 o'clock, if that would suit. To this the prisoner answered that it would suit a great deal better, and that he would be present to see the poison delivered and to witness the agreement. He then went on his way.
>
> The witness went to the spring at the appointed hour, and after waiting there a little while Mrs. Price arrived. She had a small package in one hand, which she said contained strychnine, and an envelope in the other. The package she handed to the witness saying, 'here it is.' She then directed the witness to put the poison in the old man's coffee that night when she got home, and told her as soon as he got 'passed speaking and dropped' to give the alarm, and to say that the old man had fallen dead; for all which she offered to reward her liberally. She said George (the prisoner) was 'right out there,' pointing in the direction of the corn-field. The witness

looked and saw some one there, and called the prisoner, but he did not answer. Just then, at a signal from the witness, several men, in hiding near by, rushed up, and Mrs. Price ran away, and the witness delivered to one of these men (a Mr. Brown) the package of poison she had just received from Mrs. Price. The witness also testified that she never agreed to administer the poison, and never intended to do so, and that she would not have done it for anything. 'I wanted to fool Hicks,' she said, 'because I wanted to catch him and to let other people know it.'

The connection of the prisoner with the matter, as detailed by Mrs. Long, is fully established by the record, and the question, therefore, is whether these facts constitute an indictable attempt within the meaning of the law. We are of opinion that they do not, and as they substantially correspond with the allegations of the indictment, it follows that the demurrer to the indictment ought to have been sustained. It is an elementary rule of criminal pleading that an indictment in a case like the present must allege some act done by the defendant of such a nature as to constitute an attempt, in a legal sense, to commit the contemplated offence, otherwise the indictment will not be sufficient. *Clark's case*, 6 Gratt. 675; 1 Whart. Crim. Law (9th Ed.), Sec. 192.

The question as to what is such an act, is often a difficult one to determine, and no general rule, which can be readily applied as a test to all cases, can be laid down. It has been truly said by a philosophical writer that the 'subject of criminal attempt, though it presses itself upon the attention wherever we walk through the fields of the criminal law, is very obscure in the books, and apparently not well understood either by the text-writers or the judges.' And it may be added that it is more intricate and difficult of comprehension than any other branch of the criminal law. Each case must, therefore, be determined upon its own facts, in the light of certain principles which appear to be well settled. The difficulty generally is in determining the proximity of the act in question to the offense in contemplation.

An attempt to commit a crime is compounded of two elements: (1) The intent to commit it; and (2) a direct, ineffectual act done towards its commission.

Code, Sec. 3888; 2 Bish. Crim. Prac., Sec. 71. Or, as Wharton defines it, 'an attempt is an intended apparent unfinished crime.' *Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory.* In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense *after the preparations are made. Uhl's case,* 6 Gratt., 706; *McDade* v. *People,* 29 Mich. 50.

Thus, it has been often held, under statutes similar to our own, that the purchase of a gun with intent to commit murder, or the purchase of poison with the same intent, does not constitute an indictable offence, because the act done in either case is considered as only in the nature of a preliminary preparation, and as not advancing the conduct of the accused beyond the sphere of mere intent. 'To make the act an indictable attempt,' says Wharton, 'it must be a *cause* as distinguished from a *condition.* And it must go so far that it would result in the crime unless frustrated by extraneous circumstances.' 1 Whart. Crim. Law, Sec. 181.

This is well illustrated by the case of *People* v. *Murray,* 14 Cal. 159. In that case the defendant was indicted for an attempt to contract an incestuous marriage with his niece. It was shown that after declaring his intention to marry her, he actually eloped with her, and sent for a magistrate to perform the ceremony, and at the trial he was convicted. But on appeal, the judgment was reversed, the Appellate Court holding that these were mere preparations, and did not constitute an attempt within the meaning of the statute. * * *

The same principle was recognized by the Supreme Court of Pennsylvania in a recent case, and one which bears a striking resemblance to the case before us. There the defendant was indicted and convicted for an attempt to administer poison, under a statute the provisions of which are substantially the

same as those of our own statute. It was proved at the trial that the defendant, in a conversation with a witness, Neyer, stated his grievance against his intended victim, Waring, and his determination to be revenged, and then solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward therefor. He also gave him directions how to administer the poison, and gave him the poison to be administered. But the witness refused to have anything to do with it, and handed it back to the defendant, and testified that he never intended to administer it.

Upon these facts the Supreme Court held that all that occurred at the interview with the witness and the legal inferences deducible therefrom, followed by no other act, were not sufficient to warrant a conviction for an attempt to commit the felony charged; that the act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it within the meaning of the statute, and the judgment was accordingly reversed. 'Merely soliciting one to do an act,' said the Court, 'is not an attempt to do that act. * * * In a high, moral sense, it may be true that solicitation is an attempt; but in a legal sense, it is not. *Stabler* v. *Commonwealth*, 95 Pa. St. 318.'

The Court, in its opinion, also referred to the case of *Regina* v. *Williams*, 1 Cor. and K., 589 (S. C. 1 Den., C. C., 39), which was a prosecution under the third section of the Act of 1 Victoria, from which the Pennsylvania Statute was substantially copied; and in that case it was held that the delivery of poison to an agent, with directions to him to cause it to be administered to another, was not sufficient to establish an attempt to murder. In that case the agent was actually given money for his services, and immediately proceeded with the poison to the house of the intended victims; but upon his arrival there he gave up the poison to them, and told them all about it. The prisoners were convicted, but at the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

The application of these principles to the facts of the present case shows very clearly, we think, that the judgment is erroneous. Here, undoubtedly,

there was an intent to commit murder; but the acts done do not amount to anything more than the mere arrangement of the proposed measures for its commission. They were nothing more than mere preparations, and even the intended preparations were not completed before the criminal design was frustrated. The means intended to be employed to consummate the offense were: first, the purchase of poison, and, secondly, the delivery of the poison to an agent, to be by her administered. But as the party to whom the poison was delivered refused to administer it, or to do any act in furtherance of the design, there has been no direct act done towards the commission of the offense, and, consequently, no attempt, in a legal sense, to commit the crime has been established. In other words, the acts proved, no matter how, in a moral point of view, they may be regarded, do not, in the eye of the law, approximate sufficiently near to the commission of murder to advance the conduct of the prisoner beyond the sphere of mere intent.

That the mere delivery of poison by one person to another, for the purpose disclosed by the record in the present case, does not constitute an attempt to administer poison within the meaning of the statute is clear, we think, because it is not such an act as is likely, in the natural course of events, to bring about the result desired. On the contrary, the presumption in such a case is the other way, since a criminal intent on the part of the person to whom the poison is delivered, is not to be presumed, and hence, for this reason, if no other, the act of delivering the poison is not such an one as can be considered a judicial cause, or a direct step in the actual endeavor to commit a crime—without which there can be no attempt within the meaning of the statute. 1 Whart. Crim. Law (9th Ed.), Sec. 178.

We are, therefore, constrained to hold that the conviction is wrong, and that the judgment must be reversed and the demurrer to the indictment sustained."

In the case of *Groves* v. *The State*, 116 Ga. 516, the defendant was indicted for an attempt to commit robbery, it being alleged that the accused in such attempt did do an

act towards the commission of said crime, by hiring a hack for the purpose of assisting them in the commission of the crime, by ascertaining that the intended victim of the robbery had no weapons of defense, and by procuring false faces for the purposes of a disguise. The Court said, through Justice Fish:

> "We think the demurrer should have been sustained. The indictment was based upon the Penal Code, Section 1040, which declares that 'If any person shall attempt to commit a crime, and in such attempt shall do any act towards the commission of such crime, but shall fail in the perpetration thereof, or shall be prevented or intercepted from executing the same, he shall, in cases where no provision is otherwise made in this Code, or by law, for the punishment of such attempt, be punished as follows,' etc. In order to constitute the offense of attempt to commit a crime, the accused must do some act towards its *commission*. Commission means the act of committing, doing, or performing; the act of perpetrating. Webster's Dict. Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it."

In the case of *People* v. *Youngs*, 122 Mich. 292, it was held that the defendant could not be convicted of an attempt to break and enter a dwelling house upon evidence merely that he left his home and met, by pre-arrangement, a supposed confederate at a saloon on the way to the dwelling, and after loading his revolver there and procuring extra cartridges for it, went to a drug store and bought chloroform, which, with carpet slippers and the weapon, was found on his person by officers who arrested him. Justice Montgomery, in his opinion says:

> "Two questions present themselves: (1) Does the statute in question change the common-law rule as to what constitutes an attempt to commit an offense? (2) If not, whether the facts stated show an attempt, as defined at the common law. In my opinion, both these questions should be answered in the negative.

The statute, in terms, relates to attempts to commit a crime, and, to make the intent still more certain, provides that, before the offense shall be complete, the accused shall do some act towards the commission of such offense. This does not eliminate any of the elements of the common law offense of attempt to commit crime. On the contrary, it enumerates them. To constitute an attempt, at the common law, something more than an intention or purpose to commit crime is necessary. As was said by Field, C. J., in *People* v. *Murray*, 14 Cal. 159:

'Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense. The attempt is the direct movement towards the commission after the preparations are made.'

In *Reg.* v. *Taylor*, 1 Fost. & F. 512, the chief baron said:

'The act, to constitute a criminal attempt, must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument to be used in the course of the felonious act, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature.'

See also, *McDade* v. *People*, 29 Mich. 50; *Hicks* v. *Com.*, 86 Va. 223 (19 Am. St. Rep. 891); *Reg.* v. *McCann*, 28 U. C. Q. B. 514; *Stabler* v. *Com.*, 95 Pa. St. 318 (40 Am. Rep. 653); *Com.* v. *McDonald*, 5 Cush. 367; *Griffin* v. *State*, 26 Ga. 493; *People* v. *Machen*, 73 Mich. 27; 3 Am. & Eng. Enc. Law (2nd Ed.), 266."

In the case of *State* v. *Hurley*, 79 Vt. 29, it was held that the mere fact that a prisoner, lawfully in jail, arranged for procuring saws adapted to jail breaking and thereby got them into his possession, with the intent therewith to break open the jail for the purpose of escap-

ing, did not constitute an attempt to break jail. Justice Munson in delivering the opinion of the Court, said (p. 33):

> "The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design."

In the case of *Patrick* v. *The People*, 132 Ill. 529, Justice Scholfield in delivering the opinion of the Court, said:

> "The conviction is claimed to be under Section 87 of the Criminal Code (Rev. Stat. 1874, Chap. 38, p. 364), which reads thus: 'Whoever sets at liberty or rescues, or attempts to set at liberty or rescue, a person charged with the commission of any capital offense or crime punishable by imprisonment in the penitentiary, before the conviction of such person, shall be imprisoned on the penitentiary not exceeding five years, and fined not exceeding $1,000.' The ques- therefore necessarily arises, what constitutes an 'attempt to set at liberty' a prisoner? The statute does not define 'an attempt,' and we must hence resort to the common law to ascertain what, in a legal sense, is its meaning. Bouvier, in his dictionary (Vol. 1, p. 138), says: 'An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation but falling short of execution of the ultimate design, in any part of it.' And Wharton says:
>
> 'To make the act an indictable attempt, it must be a *cause*, as distinguished from a *condition*.' 2 Crim. Law (7th Ed.), Sec. 2693. See, also, *People* v. *Mur-*

ray, 14 Cal. 159; *Griffith* v. *State*, 26 Ga. 493. Since the mere delivery of the saws, knives and file to Green Patrick, manifestly, could not open any way of escape from the jail, it is plain that there is no relation of cause and effect between that which Jackson tried to do, and that which the indictment charges and the jury found was attempted. The saws, knives and file were only implements or tools that might be used in effecting an opening in the jail, and procuring and attempting to deliver them to Green Patrick was therefore simply attempting to prepare for an attempt to make an escape. They were means, or, adopting the language of Wharton, 'conditions,' in making an attempt to escape."

It will thus be observed that to constitute an "attempt" or "endeavor" to influence a juror, it is necessary to show not only that that was the defendant's purpose, but that he performed some acts beyond *mere preparation* which would "amount to the commencement of the consummation." The foregoing cases are much stronger on the facts than the present one, in which we have only an unaccepted solicitation of a third person to ascertain a juror's attitude towards men held for trial; if we are to assume that the defendant here had in mind, upon receiving information that the juror was not hostile to the men about to be placed on trial, to "corruptly endeavor to influence" such juror, his conduct amounted to nothing *but preparation for the "endeavor."* Between the two—preparation for the endeavor and the endeavor itself to influence a juror—there is a wide difference. *People* v. *Murray*, *supra*.

As Chief Justice Holmes in delivering the opinion of the Court in the case of *Commonwealth* v. *Kennedy* (170 Mass. 22), cited by the Government, said:

> "The aim of the law is not to punish sins, but is to prevent certain results, and the act done must come pretty near to accomplishing that result before the law will notice it."

This case, on the facts, is not as counsel assumes it to be when he argues at page 22:

> "Sounding a juror as to his susceptibility to bribery is an 'endeavor' to 'influence' him, though nothing more be done, for it is an endeavor to muddy the waters, which is sufficient."

Conceding, for the sake of argument, the legal conclusions of counsel, the facts do not disclose that the third person, even if she had accepted the solicitation and acted upon it, was to sound the juror as to his susceptibility to bribery.

Counsel at page 19 of his brief states:

> "Neither are cases controlling, even if correctly decided, which hold that an 'attempt' must be something which would have succeeded were it not for causes extraneous to the act; for when it comes to an 'endeavor' to 'influence' a juror or court, mere ground baiting or dropping the net may be enough to satisfy the statute, though to catch the fish would require more, which, in fact, was never done."

Conceding that mere ground baiting or dropping of the net, though to catch the fish would require more, constitutes an attempt, rather than a preparation to catch the fish, we query counsel, would looking at the sea to ascertain whether it was practicable to drop the net or ground bait, be preparation or attempt to catch the fish? In the instant case there was no dropping of the net and no ground baiting; there was not even a looking at the sea. At most, there was but a solicitation to have some one look at the sea.

Counsel for the Government attempts to extricate himself from the extremely disconcerting dilemma in which he is placed, perforce of his efforts to extend, at best, preparatory acts to amount to an "attempt" or "endeavor,"

by advancing two most extraordinary and novel assumptions. We quote from page 19 of his brief:

> "It must be *assumed* on demurrer that the wife would repeat the remarks to the juror—that the wife and husband are one, *pro hac vic,* and therefore that the case is the same, on demurrer, as though the defendant had made the remarks to the juror himself at his residence. On these *assumptions* the indictment must be taken to allege that the defendant went to the juror's house and inquired of him."

Counsel then continues on page 20, and says:

> "On analysis, therefore, it appears that the question in the case at bar is whether an offer to bribe a juror in a pending case is an endeavor to 'influence' him within the meaning of Section 135, Criminal Code, or an 'obstructing' or an 'impending' of justice within the meaning of the same section."

We again venture to query counsel. Assume that the indictment alleged that this conversation took place with the juror himself, and conceding for the sake of argument that this conversation established a violation of Section 135, would the verdict be sustained upon proof, on trial, that the conversation took place between the defendant and the wife, and not with the husband as alleged in the indictment? Surely, if we followed counsel's metaphysics, viz., the wife and the husband should be considered one, *pro hac vic,* "and therefore that the case is the same * * * as though the defendant had made the remarks to the juror himself," the answer must be in the affirmative, but unfortunately for counsel this case must be decided according to law and not his metaphysical pronouncements. The unity of husband and wife under the common law did not apply to criminal prosecutions. It would be just as logical to assume such a unity in all criminal offenses as is argued for by counsel in this case. One might as well carry counsel's argument to its logical conclusion and say that an assault com-

mitted upon the wife might prove an allegation of an assault upon the husband, and *vice versa,* an assault by the wife might be pleaded and proved as an offense committed by the husband; or, the State, in order to have the whole and not the half, upon conviction of the husband for murder should hang the wife as well as the husband. Even the unity of husband and wife, such as was recognized at common law, has been in the State of Illinois, as well as the other States of the Union, long since destroyed by statutory enactment.

The second count of the indictment is not limited to an endeavor, but charges the positive offense that the defendant "did corruptly influence, obstruct and impede the due administration of justices in said District Court." It contains no allegation that there was any communication by the third person with the juror, and even if we assume, for the sake of argument, that the defendant here did solicit someone not only to inquire as to the juror's attitude towards defendants, but to approach him with a bribe to favor their acquittal, and that this would sustain the charge if communicated to the juror, it would still be necessary to show that there was a communication of such offer to the juror. Unless there was such a communication the juror would have had no knowledge of the offer to bribe and there could have been no "corruptly influencing, obstructing and impeding the due administration of justice."

Counsel at page 30 of his brief states:

> "There is no repugnancy between the first count charging an endeavor to influence a juror, and the second count which charges the obstructing of justice in court, because both might have been done at the same time by the same conduct, and defendant's conduct might have delayed the Court if it did not influence the juror, and it might have influenced the juror without delaying the court."

If counsel means by this that he can conceive of a case where the defendant might accomplish both ends, at the same time and by the same conduct, we have no quarrel with him. We contend, however, that these counts are repugnant because the second count in this case is predicated upon the facts recited in the first count which shows, at most, but an abortive attempt to commit the alleged offense set up in the first count, while the second count attempts to set up a completed offense to "corruptly influence, obstruct and impede the due administration of justice."

We respectfully submit the judgment of the lower court should be affirmed.

OTTO CHRISTENSEN,
Attorney for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 143.—October Term, 1920.

The United States of America, Plaintiff in Error, *vs.* L. C. Russell.	In Error to the District Court of the United States for the Northern District of Illinois.

[February 28, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

Review of an indictment in two counts for violation of Section 135 of the Criminal Code of the United States, which provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct or impede, or endeavor to influence, obstruct, or impede the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

The Government does not press the case on count two. It is only necessary, therefore, to consider count one. It charges defendant with unlawfully and corruptly endeavoring to influence one William D. Russell, who, he well knew, was a petit juror in the court in the discharge of his, the juror's duty, and who he knew had been summoned as a petit juror on April 3, 1918, at which time the trial of William D. Haywood and others was to begin. The manner of the execution of the violation of the section, the indictment details as follows: "Endeavoring to ascertain in

advance of the examination of said William D. Russell in said court as to his qualifications to sit as a petit juror at said trial whether said William D. Russell was favorably inclined towards said William D. Haywood and his codefendants, and corruptly to induce said William D. Russell to favor the acquittal of said William D. Haywood and his codefendants in case he should be selected as a petit juror at said trial, said L. C. Russell, on said April 1, 1918, called at the home of said William D. Russell at No. 604 West Thirty-first Street, in said city of Chicago, and engaged Lucy Russell, wife of said William D. Russell, in a conversation, in the course of which said L. C. Russell told said Lucy Russell that he represented said William D. Haywood and his codefendants and requested her to question her husband as to his attitude towards said William D. Haywood and his codefendants in the matter of the charges contained in said indictment and report the result of such questioning to him, the said L. C. Russell, because, as said L. C. Russell then and there stated to said Lucy Russell, they (meaning said William D. Haywood and his codefendants) did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal; by means of which request and statement said L. C. Russell conveyed to Lucy Russell, and endeavored to convey to said William D. Russell, an offer to pay money to said William D. Russell in return for his favoring such acquittal; . . . . ."

Defendant demurred to the indictment on the ground that it did not appear therefrom by any sufficient averment or recital of "jurisdictional facts that any cause involving any issue of fact triable by a jury, was at the time in said indictment mentioned, pending in the District Court of the United States, or any other court, whereby the above named United States District Court does or could acquire jurisdiction in the premises."

The enumeration of the deficiencies of the indictment may be summarized as follows: It did not appear that William D. Russell possessed the qualifications to act as a juror; or had been duly and regularly drawn and summoned; or had been examined and accepted as a juror at the array; it cannot be ascertained at what time and place the alleged conversation was had; or at what time

Lucy Russell received the impression of the meaning of the conversation; or that she had access to her husband or had opportunity, or could have communicated the conversation to him; or that defendant knew she had such opportunity; or that William D. Russell was a juror in any particular case.

The demurrer was sustained and the indictment dismissed. This writ of error was then allowed.

Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to "find out what his [L. C. Russell's] attitude was towards the defendants to be tried." And that this (we are stating the effect of counsel's contention) was only in preparation of a sinister purpose, that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did not "want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal". And this counsel says, "only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation" and "could be interpreted only . . . to be *preparation* [italics counsel's] for an 'endeavor' or 'attempt' to influence the juror, but falls far short of an actual endeavor to do so."

Counsel enters into quite a discussion, with citation of cases, between preparation for an attempt and the attempt itself, and charges that there is a wide difference between them.

We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. The word of the section is "endeavor", and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt", and it describes any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent. Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror but at the "endeavor" to do so, Experimental approaches to the corruption of a juror are the "en-

deavor" of the section. Guilt is incurred by the trial—success may aggravate, it is not a condition of it.

The indictment charges that defendant knew that William D. Russell was a petit juror in the discharge of his duty as such juror and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn. *The State of Louisiana* v. *David Woodson*, 43 La. Ann. 905. The Court, hence, erred in sustaining the demurrer and dismissing the indictment.

Judgment reversed and cause remanded for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk Supreme Court, U. S.